IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JOHN OAKLEAF[1],

Plaintiff,

v. No. 15-cv-0220 RB/SMV

FNU FRAWNER and FNU IBRAHIM,

Defendants

DEFENDANTS FNU FRAWNER AND FNU IBRAHIM'S MOTION TO STRIKE PLAINTIFF'S SECOND AMENDED COMPLAINT

Defendants FNU Frawner and FNU Ibrahim (hereinafter collectively referred to as "Defendants"), by and through their counsel of record, Keleher & McLeod, P.A., Kurt Wihl and Christina M. Gooch, pursuant to Fed. R. Civ. P. 15,[2] hereby file this Motion to Strike Plaintiff's Second Amended Complaint ("Motion"). As grounds therefore, and as set out more fully below, Plaintiff filed her Second Amended Complaint [Doc. 65] in direct violation of this Court's Scheduling Order [Doc. 56]. Defendants therefore request this Court strike Plaintiff's Second Amended Complaint. Pursuant to D.N.M.LR-Civ. 7.1(a) Defendant contacted counsel for Plaintiff and determined that Plaintiff opposes this Motion.

Background Information

The Scheduling Order [Doc. 56] entered on December 13, 2016, allowed Plaintiff until February 1, 2017, "to join additional parties and amend the pleadings (in compliance with the requirements of Fed. R. Civ. P. 15(a))." (Scheduling Order [Doc. 56] P.1) (Emphasis added). Under Fed. R. Civ. P. 15(a)(1) a "party may amend its pleading once as a matter of course within:

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[1] Plaintiff identifies as female and prefers the name Julie Marie Oakleaf. [Doc. 1]. Accordingly, Defendants will refer to Plaintiff as "she" or "her."
[2] Defendants do not argue here the Fed. R. Civ. P. 15(a) futility of Plaintiff's Second Amended Complaint but expressly reserve the right to do so in future pleadings.

(A) 21 days after serving it, or (B) if the pleading is one to which a response pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Amendments to pleadings pursuant to Fed. R. Civ. P. 15(a)(2) are only permitted "with the opposing party's written consent or the court's leave." Plaintiff's Second Amended Complaint [Doc. 65] was filed on February 1, 2017 but the Second Amended Complaint failed to abide by Fed. R. Civ. P. 15(a) as specifically required by the Scheduling Order. Fed. R. Civ. P. 15(a)(1) is inapplicable to the Second Amended Complaint as it was not filed within 21 days of Plaintiff's Civil Rights Complaint [Doc. 1] which was filed March 13, 2015, or Plaintiff's Amended Civil Rights Complaint [Doc. 14] which was filed on July 30, 2015. Instead, Plaintiff's Second Amended Complaint failed to comply with Fed. R. Civ. P. 15(a)(2) as Plaintiff neither sought Defendants' consent nor did Plaintiff seek leave of this Court before filing the Second Amended Complaint.

Argument

"Rule 15 allows a party to amend a pleading only with the court's leave". *Zisumbo v. Ogden Reg'l Med. Ctr.*, 801 F.3d 1185, 1195 (10th Cir. 2015) (emphasis added). "Plaintiffs have a right to amend their complaint once as a matter of course pursuant to Federal Rule of Civil Procedure 15(a) and to make further amendments with leave of court or the opposing party's written consent." *McDonald v. Wise,* 769 F.3d 1202, 1217 (10th Cir. 2014); *see also McPhail v. Deere & Co.,* 529 F.3d 947 (10th Cir. 2008) (where in a diversity jurisdiction argument the court discussed that the plaintiff did not have an absolute right to join parties as Fed. R. Civ. P. 15(a)(2) only allows amendments with either leave of the opposing party or of the court). A district court is not required to grant leave to amend. *Anderson v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 521 F.3d 1278, 1288 (10th Cir. 2008).

Plaintiff's Second Amended Complaint did not seek leave of court or Defendants' consent as required both by this Court's Scheduling Order and the Federal Rules of Civil Procedure. Instead, Plaintiff unilaterally filed the Second Amended Complaint which deprived Defendants of the opportunity to either withhold consent or to oppose, through pleading, any motion seeking leave to amend. Plaintiff's non-permissive filing circumvents the long tested rules of procedure and has deprived Defendants of their opportunities to oppose and brief any proposed amended complaint as provided by this Court's Scheduling Order and the Federal Rules of Civil Procedure.

Conclusion

Defendants request this Court to strike Plaintiff's Second Amended Complaint [Doc. 65]. Plaintiff filed the Second Amended Complaint by ignoring this Court's Scheduling Order and in direct violation of the Federal Rules of Civil Procedure.

Respectfully Submitted:

KELEHER & McLEOD, P.A.

By: *\/s/ Christina Muscarella Gooch*
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Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of February, 2017, I caused the foregoing pleading to be filed electronically through the CM/ECF system, which in turn caused all counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Christina Muscarella Gooch
Christina Muscarella Gooch

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